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*IBP, INC. v. ALVAREZ AND ABDELA TUM v. BARBER FOODS, INC.*—REVISITING THE LIMITATIONS OF THE PORTAL-TO-PORTAL ACT.

by

J.L. Yranski Nasuti, JD, LLM\*

The Portal-to-Portal Act of 1947<sup>1</sup> is the federal statute that places limits on the types of employee activities that are compensable under the Fair Labor Standards Act of 1938 (FLSA).<sup>2</sup> Although the activities covered by this law may only involve a few minutes in a worker's day, mischaracterizing whether those activities are compensable under the FLSA or noncompensable under the Portal-to-Portal Act can result in significant monetary consequences for both the employee and the employer. In 2005, the U.S. Supreme Court reconsidered the question of what constitutes compensable time in the consolidated cases of *IBP, Inc. v. Alvarez, et al.* and *Abdela Tum, et al. v. Barber Foods, Inc.*<sup>3</sup> The issue before the court was whether an employer is exempt under the Portal-to-Portal Act from paying for three types of employee activities: the time that an employee spends waiting to receive protective gear that must be worn at the worksite, the time that it takes to don and doff that protective gear, and the time it takes to walk between the place where the gear is donned and doffed and the production area. The court concluded that even though the statutory workday does not include the waiting time, it certainly includes the donning, doffing, and traveling time when those activities are "integral and indispensable" to the "principal activity" of the employee's work.

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Congress originally enacted the FLSA in response to a general finding that labor conditions in the 1930s were "detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers."<sup>4</sup> Two key provisions of the statute require employers to pay workers a minimum wage<sup>5</sup> and to prohibit them from employing workers in excess of 40 hours per week unless the workers receive overtime compensation at a rate not less than one and one-half times the regular rate of pay.<sup>6</sup> Although §203 defines many of the terms used in the FLSA, it fails to define two significant ones—"work" and "workweek." The U.S. Supreme Court made up for this omission in a series of 1940's decisions that interpreted those terms not only in the context of the standard definitions found in Webster's Dictionary but also in light of the remedial purposes of the FLSA. In the first case, *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*,<sup>7</sup> the court held that for statutory purposes "work or employment" included "physical or mental exertion (whether burdensome or not)

controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."<sup>8</sup> Later that same year, in the case of *Armour & Co. v. Wantock et al.*,<sup>9</sup> the court clarified its definition of "work" by noting that "exertion" on the part of the employee is not necessary if the employer has hired the employee "to do nothing, or to do nothing but to wait until something happens."<sup>10</sup> Two years later, in the case of *Anderson v. Mt. Clemens Pottery Co.*,<sup>11</sup> the court expanded the meaning of "statutory workweek" to include "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace."<sup>12</sup> That meant that employers had to compensate employees for the time spent walking between the time clocks at the factory entrance and the employees' actual workstations as well as for time required to

complete a variety of preliminary work activities.<sup>13</sup> The *Anderson* decision prompted a more employer-sympathetic Congress to amend the FLSA through the passage of the Portal-to-Portal Act in 1947.

Congress passed the Portal-to-Portal Act out of a concern that the Supreme Court's interpretation of the terms "work" and "workweek" superseded "long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation."<sup>14</sup> The Portal-to-Portal Act addressed the employers' concerns by creating statutory remedies that were intended to apply retroactively as well as prospectively. Under Part II, §2 of the Act, (entitled "Relief from Existing Claims under the Fair Labor Standards Act"), an employer was no longer be liable for claims filed prior to the enactment of the statute so long as those claims arose from activities that were neither compensable under an express contract nor an established custom or practice.<sup>15</sup> In addition, under Part III, §4, (entitled "Relief for Certain Future Claims under the Fair Labor Standards Act"), an employer would not have to compensate employees for any time spent going to and from the actual place where the principal employment activities were performed or for any time devoted to activities that are preliminary to or postliminary to the workers' principal employment activities.<sup>16</sup>

Soon after Congress passed the Portal-to-Portal Act, the Department of Labor issued regulations limiting the scope of the new law. Both 29 C.F.R. §790.6(a) and §790.6(b) provided guidance on how to calculate compensable hours. According to §790.6(a), the computation of FLSA compensable hours was not changed by the terms of the Portal-to-Portal Act so long as the time claimed was "within" the workday.<sup>17</sup> Section 790.6(b) went on to endorse a "continuous workday rule" that

measured the workday as "the period between the commencement and completion on the same workday of an employee's principal activity or activities."<sup>18</sup> When read together, the two regulations supported the conclusion that under the FLSA and the Portal-to-Portal Act, an activity was a compensable "workday" activity if it occurred within "the continuous workday."

The U.S. Supreme Court further restricted the impact of the Portal-to-Portal Act in its decision in the case of *Steiner v. Mitchell*.<sup>19</sup> The key to that case was the recognition of a distinction between employee activities that were "preliminary and postliminary" to the workday and employee activities that were "preparatory and concluding" but still within the workday. The court's ruling that the employees at the battery factory had a statutory right to be compensated for the time they spent changing their clothes at the beginning of the shift and showering at the end of the shift was based on two important factual findings. The first was that the employees worked with dangerously caustic and toxic materials. The second was that they were required, for public health and safety reasons, to change their clothes and shower before they could leave the workplace. The court noted that there was a substantial difference between employees changing and showering at the end of work under normal conditions and their changing and showering as a result of health and safety risks associated with the production of batteries. That difference meant that the latter could be classified as activities that are an "integral and indispensable part of the principal activities." The court went on to conclude "that activities performed either before or after the regular shift work, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which the

covered workmen are employed and are not specifically excluded by §4(a)(1)."<sup>20</sup>

The *Steiner* decision acknowledged that the Portal-to-Portal Act was the consequence of a negative Congressional reaction to the *Anderson* case. The court also admitted that it had experienced difficulty in trying to understand some of the provisions of the new act. While the purpose of §2 was clearly to limit an employer's liability for unexpected wages based on activities occurring before 1947, the purpose of other sections was much less obvious. The court found it necessary to review the legislative history—and especially that of the Senate—in order to untangle the statutory ambiguity. Much of the court's inquiry was directed at understanding the meaning of the phrase "principal activity or activities" as it was used in §4.<sup>21</sup> In the end, the court concluded that "while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities."<sup>22</sup> Consequently, whether an employer had to compensate an employee for work that had been performed before or after the regular work shift and on or off the production line depended on whether those activities were an "integral and indispensable part of the principal activities for which the person was employed" as opposed to being "preliminary to or postliminary to said principal activity or activities."

Nearly fifty years after *Steiner*, the Supreme Court agreed to reconsider the question of the FLSA compensability in two new donning and doffing cases. The primary difference between the *Steiner* case and the consolidated cases of *IBP* and

*Barber Foods* was that the issue was no longer whether donning and doffing of mandatory protective gear was compensable. The new focus was on the issue of whether two employee activities--the time spent waiting to collect the protective gear and the time spent either walking to a work site after donning the gear or walking from the work site to the area where the gear is doffed--are integral and indispensable to the employee's work and, therefore, compensable.

## II.

The *IBP* and *Barber Foods* cases both involved FLSA claims by workers employed in the food processing industry. *IBP, Inc.*, the world's largest producer of fresh beef, pork, and related products, operates a "kill and processing plant" in Pasco, Washington. At the time of the lawsuit, the employees at the Pasco plant included approximately 178 workers in the slaughter division and 800 line workers in the processing division. All of the production workers in both divisions were required to wear sanitary outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots. Others, including those who worked with knives, also had to wear protective equipment including chain link metal aprons, vests, plexiglass armguards, and special gloves. When the protective gear was not being use, it had to be stored in locker rooms at the plant.<sup>23</sup>

The production line workers at the Pasco plant were covered by a collective bargaining agreement that required them to be at their workstations and prepared to work from the moment the first piece of meat came across the production line. Prior to arriving at their workstations, the employers had to gather their assigned equipment, don that equipment in the locker rooms, and prepare work-related tools. It was only when these tasks



were completed that the employees could walk to the slaughter or processing floors. If employees needed to visit the cafeteria or restrooms during their unpaid thirty-minute meal break, they were required to remove the outer garments, protective gear, gloves, scabbards, and chains. (It was the company's policy that any time needed to doff and don the equipment had to be completed during the break time.) Finally, at the end of each workday, the workers were required to clean, restore, and return their equipment to the appropriate on site storage area.<sup>24</sup>

Although the IBP workers were required to use a computerized "swipe card" system when they arrived at and left the plant, they were not paid based on the data from their individual swipe cards. Pay was based, instead, on a "gang time pay" model. Under such a plan, workers only received compensation for the actual time that all of the employees were actually cutting and bagging meat. Compensable time began with the processing of the first piece of meat and ended with the processing of the last piece of meat. As a result, workers were not paid for the time it took to don and doff the protective gear or for the time needed to walk between the locker rooms and production floor at the beginning and end of the work shifts.<sup>25</sup>

The second of the two consolidated cases involved a claim, which was filed against Barber Foods, Inc., by some of the 300 hourly waged workers at its Portland, Maine plant. The employees, who were divided between two shifts with six production lines each, worked in the secondary processing of poultry-based products. The poultry products, which were assembled on three specialty production lines, were pouched, packed, and palletized on three pack-out production lines. The production workers included the rotating associates (who rotated to different positions every few hours), the set-up operators (who maintained the various machines on the lines),

the meat room associates (who blended the raw products with the ingredients), the shipping and receiving associates, the maintenance workers, and the sanitation workers.<sup>26</sup> All of the production workers were required to wear certain kinds of protective gear that had to be donned before the workers punched in and doffed after they punched out. The required gear included lab coats, hairnets, and earplugs for the rotating associates;<sup>27</sup> lab coats, hairnets, earplugs, safety glasses, steel-toed boots, bump hats, back belts, and lock-out/tag out equipment for the set-up operators; lab coats, hairnets, earplugs, safety glasses, steel-toed boots, and back belts for meatroom associates;<sup>28</sup> and steel-toed boots, hard hats, and back belts for shipping and receiving associates.<sup>29</sup>

Barber Foods provided the mandatory equipment to the employees. Some items, such as the bump hats, back belts, safety glasses, steel-toed boots, and reusable earplugs that were given to the workers on a one-time basis and replaced only as needed, could be stored either in the workers' lockers or at their homes. The rest of the items had to be picked up and returned to a variety of locations in the plant by the employees each day.<sup>30</sup> It was only after the workers have waited for, collected, and donned their equipment that they were allowed to punch in at their designated computerized time clocks.<sup>31</sup> Employees were paid from the moment that they punched in until the moment that they punched out. In addition, the company had a twelve minute "swing time" that allowed an employee to punch in up to six minutes early and get paid for that time or punch out up to six minutes late without being charged with an attendance violation.

### III.

The *IBP* and *Barber Foods* cases, which were both filed in federal courts, presented similar, though not identical, claims

under the FLSA. Both sets of plaintiffs asserted that their employers had violated the FLSA when they failed to compensate the workers for the time spent donning and doffing the protective gear and for the time spent walking between the locker rooms and the production floors of the processing facilities. In addition, the employees in *Barber Foods* claimed compensation for the time they had spent waiting to receive their protective gear.

a. *Alvarez v. IBP*.

The *IBP* class action case was originally filed in the U.S. District Court for the Eastern District of Washington.<sup>32</sup> After a twenty-day bench trial, Judge Robert H. Whaley concluded that the employer were obliged, under the terms of the FLSA, to compensate the workers for the time they spent donning and doffing protective gear that was unique to a particular job since that time was integral and indispensable to the work of the employees. In addition, employees, who were required to don and doff unique protective gear, had to be paid for the time it took them to walk between the locker room and the production area since those activities occurred during the continuous workday. On the other hand, employees were not be entitled to be paid for the time they had spent in ordinary clothes changing and washing or for the donning and doffing of a hard hat, ear plugs, safety glasses, boots, or a hairnet.

The *IBP* case was appealed to a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit.<sup>33</sup> In response to the threshold question of whether the donning and doffing and waiting and walking constituted "work" under the FLSA, the appellate court answered in the affirmative.<sup>34</sup> The court then considered whether the activities, which were preliminary and postliminary to the principal activity of the job, were, if fact, "an integral and indispensable part of the principal activities"

and, therefore, not covered by §4(a) of the Portal-to-Portal Act. Noting that the Supreme Court had adopted a context-specific approach in deciding whether an activity was integral and indispensable to a principal activity, the Ninth Circuit evaluated the activities in question to determine if they were both necessary to the principal work performed and done for the benefit of IBP.<sup>35</sup> Since federal law (including the sanitation standards of the Department of Agriculture and the industry standards of the Occupational Safety and Health), IBP's own internal rules, and the nature of the work all required the plaintiffs to don and doff specific gear, the appellate court concluded that the activities were "necessary" to the "principal" work performed. The fact that the workers had to use the protective gear in order to prevent unnecessary workplace injury and contamination (which would impede work on the production line) also supported the trial court's conclusion that the donning, doffing, and cleaning activities were for the benefit of the employer.<sup>36</sup>

The Court of Appeals distinguished between the donning, doffing, and cleaning of unique protective gear (such as Kevlar gloves) and non-unique gear (such as hard-hats and safety glasses). While the court concluded that both types of gear were necessary for the performance of the principal work (and as such could fall under the *Steiner* exception), it denied compensation for the time spent donning and doffing the non-unique gear on the grounds that that time was *de minimis* as a matter of law.<sup>37</sup>

IBP had also argued that 29 U.S.C. §203(o), (hereinafter referred to as §3(o)), provided a statutory basis for denying compensation to workers for the time spent donning and doffing their gear. Section 3(o) of the FLSA excluded from compensable time "any time spent in changing clothes or washing at the beginning and end of each workday which was

excluded from measuring working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." The Circuit Court rejected IBP's expansive understanding of the phrase "changing clothes." It reasoned that since there was no statutory clarification, legislative history, or case law to help explain the meaning of the phrase, it had no choice but to give the words their "ordinary, contemporary, common meaning."<sup>38</sup> That meant that the protective gear that had been worn by IBP's workers and that certainly had been different from typical clothing, did not "plainly and unmistakably" fit within the statute's meaning of word "clothing". This conclusion was supported by reference to an OSHA regulation that had made a similar analytical distinction between "general work clothes" and "personal protective equipment."<sup>39</sup> Consequently, the court held that the §3(o) exemption did not apply in this instance.<sup>40</sup>

The employer was equally unsuccessful in its assertion that the District Court erred in its determination of what constituted a compensable workday. IBP suggested that §4(a)(1) of the Portal-to-Portal Act was a "stand alone" provision that had to be read to exclude compensation for any and all "walking, riding, or traveling to and from the actual place of performance of the principal activity."<sup>41</sup> As such, IBP argued that even if it had to pay its employees for the time spent donning and doffing the protective gear, it certainly did not have to compensate them for the time spent walking between the locker rooms and their workstations. According to IBP, the compensable workday was made up of the sum of a number of discrete periods—the time spent donning and doffing of the gear and the time spent at the workstation—but not the time spent walking to the worksite or the principal activity. The Court of Appeals rejected IBP's arguments and affirmed the trial judge's view that the compensable workday began with

the first act of compensable work and did not end until the last act of compensable work was completed. Since the trial court had determined that the first act of compensable work had been the preliminary donning of the protective gear and that the last act had been the returning to the changing areas and doffing the gear and since it had also determined that both activities were "integral and indispensable" to the principal work activities, the court did not err in holding that the workday included the reasonable time spent walking between the locker rooms and the workstations.

b. *Abdela Tum, et al. v. Barber Foods, Inc.*

The *Barber Foods* case, which was filed in the federal court in Maine,<sup>42</sup> was originally presented to a federal magistrate, who recommended a partial summary judgment in favor of the defendant. In the first of two critical rulings, the magistrate held that the time spent donning and doffing clothing and equipment was compensable (and not excluded as preliminary and postliminary activities under the Portal-to-Portal Act) if the activities had been mandated by the employer or by the government. Employees, on the other hand, were not entitled to compensation for the time it took them to don and doff clothing and equipment that they were not required to use.<sup>43</sup> The second ruling rejected the claim that the employer had to pay workers for the time they had spent waiting to obtain mandated gear since these activities could not reasonably be construed to be an integral part of the employees' work activities.<sup>44</sup> The magistrate concluded by recommending that a summary judgment be entered denying the claims relating to the time each employee spent walking from the entrance of the plant to the employee's workstation, locker, time clock or site where the required clothing and equipment were distributed and for claims based on the time spent waiting to punch in or



out for that clothing and equipment.<sup>45</sup> What the magistrate did not consider was the applicability of §4 of the Portal-to-Portal Act to the time spent walking between the place of donning and doffing and the production line.<sup>46</sup>

When the case was presented to the trial court, Judge Gene Carter followed the recommendation of the magistrate and granted the partial summary judgment in favor of Barber Foods. The only unresolved issue involved Barber Foods' alleged liability for the time its employees spent donning and doffing various gear. Prior to submitting the case to the jury, the parties stipulated that four categories of workers (the rotating, set-up, meatroom, and shipping and receiving associates) had been required to don and doff protective gear at the beginning and end of their shifts. The instructions to the jury asked for a specific set of factual findings. The first required the jury to determine how much time was reasonably needed to don and doff the gear. The second asked whether that time had been *de minimis* and, consequently, noncompensable. The jury ultimately concluded that in each case the time had in fact been *de minimis* and noncompensable.<sup>47</sup>

Both parties appealed the decisions of the lower court to a three-judge panel of the U.S. Court of Appeals for the First Circuit.<sup>48</sup> The employees claimed that the lower court had erred when it granted the partial summary judgment in favor of the defendants and when it instructed the jury. The employer, in a cross-appeal, objected to the lower court's ruling that the donning and doffing of required clothing and equipment had been an integral part of the employees' work and, as such, had not qualified as noncompensable preliminary and postliminary activities under the Portal-to-Portal Act.

The appellate court's *de novo* review of the lower court's granting of a partial summary judgment focused on two issues. The first was whether the trial court had erred in denying the employers compensation for the time spent going from place to place to collect different pieces of required clothing and gear, for the time spent walking from where those items were received to the time clocks, and for the time spent doffing and disposing of the items at the end of the day. The second issue was whether the court had erred in denying the employees compensation for the time they had spent waiting in line to collect the required gear and to punch in at the time clocks.

The three-judge panel affirmed the trial court's denial of compensation for walking time. It found support for the lower court's decision in 29 C.F.R. §790.7(g) n.49, which provided that even though the changing of clothes may in "certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity[.]' this does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which the section 4(a) [Portal-to-Portal Act] refers."<sup>49</sup> The appellate court further stated that even if it had assumed, for the sake of argument, that employees had been engaged in an integral and indispensable part of their principal employee activities when they donned and doffed mandated gear, their walking time would still be noncompensable under the Portal-to-Portal Act.<sup>50</sup> Just because the traditional understanding of a primary activity had been stretched to cover donning and doffing in a very limited number of cases did not mean that Congress intended to create an avenue to circumvent the Portal-to-Portal Act's exemption of preliminary and postliminary activities.<sup>51</sup> The panel then referred to 29 C.F.R. §790.7 to determine whether



the walking in this case had merely been a "preliminary or postliminary" activity. After differentiating the facts in this case from the examples listed in the federal regulation, the court found that the time that had been spent walking from place to place to gather ordinary safety gear and to punch in "[fell] outside of the narrow category of walking that [was] 'not segregable from the simultaneous performance of [their] assigned work.'"<sup>52</sup>

The appellate court also rejected both of the employees' claims that they should have been compensated for the time that they spent waiting to punch in and waiting to collect the required clothing or gear. The panel found no persuasive argument to depart from the general rule, articulated in 29 C.F.R. §790.8 (c) n. 67, that states that even when changing clothes has been considered to be a principal activity, "activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities."<sup>53</sup> The panel similarly rejected the employees' claim that they should have been compensated for the time they had spent waiting to collect the required gear after noting that 29 C.F.R. §790.8 states that a reasonable amount of time was intended to be preliminary and postliminary—and noncompensable.<sup>54</sup>

The Court of Appeals granted the plaintiffs' request for a rehearing and reaffirmed the decision of the district court and the three-judge panel.<sup>55</sup> The court began by agreeing that the donning and doffing of gear was only an integral and indispensable part of an employee's principal activities when the employer or government had mandated the use of the gear. It went on to reject the employees' claims that they should have been compensated for any walking time that occurred between when the employees picked up their first piece of required gear and when they returned the gear at the end of the

shift. This conclusion was based on the court's understanding of 29 C.F.R. § 790.7(g) n. 49 and a narrower understanding of the term "workday".<sup>56</sup> The issue of whether employees should be compensated for waiting in line to receive mandated gear and to punch in at the time clocks was also decided in favor of the employer. The court characterized this as a classic FLSA case of "waiting to be engaged" and not as a case of "engaged to wait." It went on to note that even if the waiting time qualified as "engaged to wait" time, it would not be compensable since it also constitutes a preliminary or postliminary activity that is noncompensable under the Portal-to-Portal Act.<sup>57</sup> Finally, the court rejected both the employer's cross-appeal (on the grounds that a party cannot appeal a favorable judgment merely to obtain the review of a finding it deems erroneous) and the employee's objection to the jury instructions (on the grounds that the instructions were correct and did not confuse or mislead the jury.)<sup>58</sup>

#### IV.

The U.S. Supreme Court granted *certiorari* to the consolidated cases of *IBP* and *Barber Foods* in order to resolve the differences between the lower courts on two questions. The first question was whether the FLSA required the employer to pay an employee for postdonning and predoffing walking time. The second question, which had only been raised in the *Barber Foods* case, was whether the FLSA also required the employer to compensate an employee for the time spent waiting to collect the protective gear. The court's opinion, which was delivered by Justice John Paul Stevens, held that an employer was required to compensate employees for the time they spent walking between changing and production areas when the donning and doffing of required gear was "integral and indispensable" to the workers' "principal activities." Under the continuous workday rule, the

workday began when the required gear was donned and continued uninterrupted until the gear was finally doffed. Since the time spent waiting to receive and don the first piece of gear was more properly characterized as a "preliminary" activity, it was not compensable under the terms of the Portal-to-Portal Act.

The court's unanimous decision began with a summary of the legislative history of the FLSA and the Portal-to-Portal Act and with a review of the judicial interpretation of the statutes. Particular attention was paid to §4(a) of the law, which had narrowed the scope of future FLSA claims. The court conceded that §4(a) had nullified previous judicial decisions that had allowed compensation to employees both for the time spent on the employer's premises walking to and from the actual place where the employees' principal activities were performed and for the time spent performing activities that were "preliminary or postliminary" to the employees' principal activities.<sup>59</sup> On the other hand, the court found that, except for those two types of activities, the Portal-to-Portal Act had not altered the judicial interpretation of the terms "work" and "workday" nor had it provided an alternative definition for the term "workday."<sup>60</sup> It also noted that the regulations issued by the Secretary of Labor after the passage of the legislation indicated that the statute had had no effect on the computation of hours worked within the "workday" proper (29 C.F.R. §790.6(a))<sup>61</sup> and that it had not changed the continuous workday regulation that defined the workday as the "period of time between the commencement and completion on the same workday of an employee's principal activity or activities" (29 C.F.R. §790.6(b)).<sup>62</sup> The court concluded the first part of its decision by reaffirming its holding in *Steiner* that the time spent in activities such as the donning and doffing of specialized protective gear was compensable if the activities were an "integral and indispensable part of the principal activities."<sup>63</sup>

IBP's appeal was based on its belief that §4(a)(1) of the Portal-to-Portal Act excluded FLSA compensation for the time spent walking between the locker rooms and the production areas. IBP did not challenge the lower court's finding that the donning and doffing of protective gear were compensable activities under §4.<sup>64</sup> It tried instead to differentiate between the category of "integral and indispensable" activities that might be compensable because they are not merely preliminary or postliminary within the meaning of §4(a)(2)" and the category of actual "principal activities" which the employee was "employed to perform" within the meaning of §4(a)(1). Activities that were "integral and indispensable" to the "principal activities" of the employee were covered by the FLSA and not excluded by §4(a)(2). That did not, however, mean that the "integral and indispensable" activities were themselves "principal activities" as defined by §4(a)(1). The significance of this distinction was that while "integral and indispensable" activities might be compensable, only "principal activities" could trigger the beginning of the compensable workday.

IBP's attempt to claim two different meanings for the phrase "principal activities" under §4(a)(1) and §4(a)(2) of the Portal-to-Portal Act was rejected by the Supreme Court. Justice Stevens, referring to the *Steiner* case, noted that when activities were "integral and indispensable" to "principal activities," they were not excluded from FLSA coverage by §4 of the Portal-to-Portal Act precisely because they were themselves "principal activities."<sup>65</sup> Although the court acknowledged that *Steiner* decision had only been concerned with the meaning of "principal activity or activities" under §4(a)(2), it presented two reasons why that meaning was also applicable to §4(a)(1). The first was a matter of normal statutory interpretation—identical words used in different parts

of the same statute are generally presumed to have the same meaning.<sup>66</sup> The second was that the “*said* principal activity or activities” referred to in §4(a)(2) was an explicit reference to the use of the same term in §4(a)(1).<sup>67</sup> The court also rejected IBP’s assertion that some activities may be sufficiently “principal” to be compensable, but not sufficiently “principal” to commence the workday. It concluded instead that while walking to the locker room to don special safety gear would be noncompensable time under §4(a)(1), walking from the locker room after donning the special safety gear would be compensable §4(a)(1) since the locker room had become the relevant “place of performance” of the principal activity that the employee was employed to perform.<sup>68</sup>

In addition to presenting arguments based on the text of the Portal-to-Portal Act, IBP also suggested that the court should construe the statute in a way that would effectuate the real purpose for which it was enacted. IBP claimed that there was a proximate cause connection between Supreme Court’s decision in the *Anderson* case (in which the court granted compensation for the time employees spent walking from the punch in clock to the actual workstation) and the passage of the Portal-to-Portal Act (in which Congress excluded from compensation the time spent walking to and from the actual place of performance of the principal activity or activities which the employees had been employed to perform). The court rejected this line of reasoning on the grounds that there was a crucial difference between the walking in the *Anderson* case and the walking in the *IBP* case. In the former, the walking occurred before the workday began whereas, in the latter, the walking did not occur until the workday had already begun.<sup>69</sup>

The court also considered the impact of a number of regulations, which had been adopted by the Secretary of Labor shortly after the enactment of the Portal-to-Portal Act. The

regulations not only supported the employees’ view that the donning and doffing of protective gear were compensable activities but they also defined the outer limits of the workday. Both 29 C.F.R. §790.7(c) and §785.38 suggested that the time spent walking between a locker room and a production area was similar to the compensable time spent walking between different workplaces on the disassembly line.<sup>70</sup> The court noted that while 29 C.F.R. §790.6, measured the limits of most workdays as “roughly the period ‘from whistle to whistle,’” 29 C.F.R. §790.6(b) stated that the term “workday” had also been used in the Portal-to-Portal Act to mean, “in general, the period between the commencement and completion on the same workday of an employee’s principal activity or activities.”<sup>71</sup> Finally, the court agreed with IBP’s claim that, under 29 C.F.R. §790.7(g), n. 49, the postchanging walking time was not “necessarily” excluded from the scope of §4(a)(1).<sup>72</sup> That, however, did not help IBP’s case since the fact that the activity was not “necessarily” excluded did not mean that it was *always* excluded and since the ambiguity in the regulation’s note did not overcome the meaning of the statute, as it had been resolved in the *Steiner* decision.<sup>73</sup> Justice Stevens summarized the court’s holding in the *IBP* case by stating that if an employee’s activity was “integral and indispensable” to a “principal activity,” it was itself a “principal activity” under §4(a) of the Portal-to-Portal Act.

#### b. *Barber Foods, Inc.*

It was only after resolving the issues in the *IBP* case that the Supreme Court considered the one unique issue in the *Barber Foods* case: whether the time that had been spent waiting to obtain mandatory clothing and equipment was compensable.<sup>74</sup>



The employees claimed that the waiting time was “integral and indispensable” to the “principal activity” of donning, and was therefore itself a principal activity.”<sup>75</sup> The employer, on the other hand, took the position that the waiting time qualified as a “preliminary or postliminary activity” that was explicitly covered by §4(a)(2) of the Portal-to-Portal Act. The court based its decision in favor of the employer on the distinction it drew between the time spent donning mandatory gear, “which was *always* essential if the worker is to do his job,” and the time spent waiting to receive the gear, which “may or may not be necessary in particular situations or for every employee.”<sup>76</sup> Although the waiting time was certainly a “preliminary” activity, it was not an activity that was “integral and indispensable” to a “principal activity.” The conclusion that there was a difference between preshift activities that were “necessary” to a principal activity and preshift activities that were “integral and indispensable” to a principal activity was based on an understanding that the waiting time was analogous to the kind of walking time, which the court had found to be compensable in the *Anderson* case and which Congress had repudiated in the Portal-to-Portal Act.<sup>77</sup>

The court also rejected a claim that had been presented by the government in an *amicus* brief filed on behalf of the employees. The government claimed that, under 29 C.F.R. §790.7(h), when an employee “is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for the work would be an integral part of the employee’s principal activities.” The problem with trying to apply this waiting to work regulation to the *Barber Foods* case was that there had never been any allegation or finding that the protective gear had been

unavailable to the employees when they finally arrived at the front of the waiting line.<sup>78</sup> Although the court rejected the applicability of §790.7(h), it did find §790.7(g) to be pertinent. Under this section, the Secretary of Labor characterized as “preliminary,” and noncompensable, the time that an employee waited to check in or to receive a paycheck. The court concluded that these kinds of collateral activities, which are similar to the collateral activity of waiting to collect required gear, are only compensable if they are covered by an agreement of the parties or by the custom or practice of a particular industry.

## V.

The Supreme Court’s decision in the consolidated *IBP* and *Barber Foods* case was the not one of the big decisions of the first year of the new Roberts’ court. Nor was it a landmark employment law case. Instead, the unanimous decision demonstrated an affirmation by the court of key understandings of the FLSA and the Portal-to-Portal Act. There were no conceptual changes to the meaning of the words “work,” “workweek,” and “continuous workday.” “Preliminary and postliminary” activities were still found to be distinct from “preparatory and concluding” activities. The characterization of preparatory and concluding activities as “integral and indispensable” to the principal activity still resulted in increasing the length of the compensable day. Walking time was found to be compensable while waiting time was not. In each instance, the court balanced the statutes, the administrative agency regulations, and past judicial decisions in order to arrive at a decision that was balanced.

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## ENDNOTES



<sup>1</sup> 29 U.S.C. §§ 251-262.

<sup>2</sup> 29 U.S.C. §§ 201-219.

<sup>3</sup> 546 U.S. 21; 126 S.Ct. 514 (2005).

<sup>4</sup> 29 U.S.C. § 202 (a).

<sup>5</sup> 29 U.S.C. §206(a)(1).

<sup>6</sup> 29 U.S.C. §207(a)(1).

<sup>7</sup> 321 U.S. 590; 64 S.Ct. 698 (1944). The Court held that iron ore miners were entitled to compensation for the time spent underground as they traveled to and from the "working face of the mines." Although the travel time might have been considered non-productive in the strict sense, the Court concluded that it constituted a "process or occupation necessary . . . to production" within the meaning of the FLSA.

<sup>8</sup> *Id.* at 598.

<sup>9</sup> 323 U.S. 126; 65 S.Ct. 165 (1944). In this case, auxiliary fire fighters claimed compensation for the time that they were required to remain in the fire hall at the end of their regular day-shift in order to respond to fire-alarms, make any temporary repairs of fire equipment, and take care of the sprinkler system if it was defective or set off by mistake. In fact, much of that time was idle time. The Court held that the idle time could be compensable if it was spent predominately for the employer's benefit and not for the employee's. Such a determination could only be made after a review of all the circumstances of the case.

<sup>10</sup> *Id.* at 133.

<sup>11</sup> 328 U.S. 680; 66 S.Ct. 1187 (1946). The employees in this case worked in a pottery plant. At the beginning and end of each day, they were required to punch time clocks that were located at the entrance of the plant. Workers could punch in during a 14 minute period of time before the regular starting time for productive work and could punch out during another 14 minute period of time at quitting time. Since 200 employees were punching in and out at the same time, a minimum of eight minutes was usually needed to get

by the time clock. The estimated walking time between the time clocks and work places would range between 30 seconds and three minutes. *Id.* at 683.

The employees' compensation was not based on the actual times that they punched in or out but from the next even quarter hour after punching in until the next even quarter hour prior to punching out. That meant that an employee, who punched in for work at 6:46 a.m., punched out and in for lunch at 12:14 p.m. and 12:46, and finally punched out for the day at 4:14 p.m., would be paid for an eight hour day even though the worker's actual time on the work site would include 56 additional minutes. *Id.* at 683-684.

<sup>12</sup> *Id.* at 690-691.

<sup>13</sup> These activities included putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools. The Court also held that compensation could be denied, under the *de minimus* rule, for work that involved insubstantial or insignificant periods of time.

<sup>14</sup> 29 U.S.C. §251(a).

<sup>15</sup> Section 2 (codified at 29 U.S.C. §252), (hereinafter referred to as §2), states that:

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act [May 14, 1947], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom, practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in

effect at the time of such activity, between such employer, his agent, or collective-bargaining representative and his employer.”

<sup>16</sup> Section 4 (codified at 29 U.S.C. §254), (and hereinafter referred to as §4) states that:

“(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

“(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

“(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

“(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

“(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

“(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, or inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.”

<sup>17</sup> 29 C.F.R. §790.6(a) provides that: “Section 4 of the Portal Act does not affect the computation of hours worked within the ‘workday’ proper,

roughly described as the period ‘from whistle to whistle,’ and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by the employee during that period. Under the provisions of section 4, one of the conditions that must be present before ‘preliminary’ or ‘postliminary’ activities are excluded from hours worked is that they ‘occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases’ the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee’s first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the ‘workday’ proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the ‘workday’ in activities of the kind described in section 4.”

<sup>18</sup> 29 C.F.R. § 790.6(b).

<sup>19</sup> 350 U.S. 247, 76 S.Ct. 330 (1956).

<sup>20</sup> *Id.* at 256.

<sup>21</sup> The Court found the following interchange between Senators Cooper and McGarth to be particularly significant on the question of prospective liability:

SENATOR McGRATH: “I think that at this point we might very definitely make contribution to the legislative history of what we are doing here. Am I correct in understanding the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day’s work?”

SENATOR COOPER: “I can read the language used in the report, and I think that language should be used in this connection, because the words

and phrases it employs were adopted by the committee. On page 48 of the report, in the definition of 'principal activity,' we find these words:

"It will be observed that the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities marked the beginning and the end of his workday. The term "principal activity or activities" includes all activities which are an integral part thereof as illustrated by the following examples:

"1. In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

"2. In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee."

"We believe that our bill provides that the employee must receive compensation for such activities."

SENATOR McGRATH: "Then we can clear that point up by reiterating that what the committee means is that any amount of time spent in the performance of the type of activity expressed in examples 1 and 2 is to be hereafter regarded as compensable time."

SENATOR COOPER: "I should certainly say so, as a part of the principal activity."

SENATOR McGRATH: "There are innumerable instances of operations which have to be performed that are not covered in these particular examples. I think of one at the moment. In certain of our chemical plants workers are required to put on special clothing and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?"

SENATOR COOPER: "I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine

distinction between the type of activity which we consider compensable and the type which should not be compensable. In accordance with our intention as to the definition of 'principal activity,' if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity. On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable." (93 Cong. Rec. 2297-2298.) *Id.* at 257-258; 336-337.

<sup>22</sup> *Id.* at 255.

<sup>23</sup> *Supra*, n. 3, at 521-522.

<sup>24</sup> *Alvarez v. IBP*, 339 F.3d 894, 898 (9<sup>th</sup> Cir., 2003).

<sup>25</sup> *Id.* at 899-900.

<sup>26</sup> *Abbela Tum, et al., v. Barber Foods, Inc.*, 331 F.3d 1, 2-3 (1<sup>st</sup> Cir., 2003).

<sup>27</sup> The rotating associates were also required to wear safety glasses. The glasses and other non-mandatory items such as gloves, aprons, and sleeve covers could be donned and doffed after punching in and before punching out. *Id.* at 3.

<sup>28</sup> The meatroom associates were also required to wear vinyl gloves, and aprons. These and other non-mandatory items such as sleeve covers could be donned and doffed after punching in and before punching out. *Id.* at 4.

<sup>29</sup> *Id.* at 3-4.

<sup>30</sup> Lab coats and cotton glove liners could be found on hanger racks and in tubs in the hallway between the entranceway and the equipment cage. Hairnets and earplugs aprons had to be obtained at the window of the equipment cage. Vinyl gloves, sleeve covers, and aprons were available at the window of the equipment cage or from tubs on the production floor. *Id.* at 4-5.

<sup>31</sup> Rotating associates, set-up operators, and meatroom employees punched in at a clock near where they work and punched out on clocks next to the two primary exits. Maintenance workers punched in on a clock in the maintenance room. Shipping-and-receiving workers used a clock next to the shipping-and-receiving office to punch in and out. Sanitation workers punched in on the cafeteria clock and out on the plant office clock. *Id.* at 5-6.

<sup>32</sup> *Alvarez v. IBP, Inc.*, 2001 U.S. Dist. LEXIS 25344 (E.D. Wash., Sept. 14, 2001).

<sup>33</sup> *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9<sup>th</sup> Cir., 2003). The opinion of the court was delivered by Judge Sidney R. Thomas.

<sup>34</sup> The Circuit Court applied the Supreme Court's definition of "work" in the *Muscoda* case and held that since the donning and doffing had been "pursued necessarily and primarily for the benefit of the employer," it constituted work. *Id.* at 902 (citing, *supra*, note 7, at 598.)

<sup>35</sup> *Id.* at 902-903.

<sup>36</sup> *Id.* at 903.

<sup>37</sup> *Id.* at 903. The Circuit Court cited Supreme Court's decision in *Anderson*: "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA]." *Supra*, n. 11, at 692.

<sup>38</sup> *Supra*, n. 33, at 904.

<sup>39</sup> 29 C.F.R. §1910.1030(b) states that: "Personal protective equipment is specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (e.g. uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment."

<sup>40</sup> *Supra*, n. 33, at 905.

<sup>41</sup> *Id.* at 906.

<sup>42</sup> *Abdela Tum, et al., v. Barber Foods, Inc.*, 2002 U.S. Dist. LEXIS 1064 (D.Me., Jan. 23, 2002).

<sup>43</sup> *Supra*, n. 3, at 526 (citing App. to Pet. for Cert. in 04-66, pp. 36a-40a.).

<sup>44</sup> *Id.* at 526 (citing App. to Pet. for Cert. at 33a.)

<sup>45</sup> *Id.* at 526 (citing App. to Pet. for Cert. at 33a-34a.)

<sup>46</sup> *Id.* at 526.

<sup>47</sup> The jury found that the combined donning and doffing time for rotating associates had been 1 minute, for set-up operators 2 minutes 16 seconds, for meatroom associates 1 minute 53 seconds, for shipping and receiving associates 2 minutes 8 seconds, and for maintenance and sanitation workers no minutes since they had not been required to don and doff clothing before punching in and punching out.

<sup>48</sup> 331 F.3d 1 (1<sup>st</sup> Cir, 2003).

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.* at 6. The court found it nonsensical that the employees had conceded that the time needed to walk to the place where first piece of mandatory gear had been collected was not compensable and still have claimed that they should be compensated for the time it took them to pick up their gear from two bins instead of one bin.

<sup>52</sup> *Id.* at 7 (citing 29 C.F.R. §790.7(d)).

<sup>53</sup> *Id.* at 7.

<sup>54</sup> The Code would have allowed compensation for preliminary activities such as the time loggers spend taking carry heavy equipment out to a logging site and the time butchers spend sharpening knives. The court, however, found that there was a significant difference between those types of activities and the waiting time claimed by the Barber employees. It concluded that it had to draw a line in this case "otherwise an almost



endless number of activities that precipitate the employee's essential tasks would be compensable." *Id.* at 7-8.

<sup>55</sup> 360 F.3d 274 (1<sup>st</sup> Cir., 2004). Judge Torruella, the author of the original three-judge panel's opinion, presented the opinion of the appellate court after the rehearing.

<sup>56</sup> The court rejected the Labor Secretary's suggestion that the ordinary "workday" rule should be expanded "in favor of a broader, automatic rule that any activity that satisfies the "integral and indispensable" test itself starts the workday, regardless of context." *Id.* at 280.

<sup>57</sup> *Id.* at 281-282

<sup>58</sup> In a concurring opinion, Judge Boudin found in favor of the employer both with regard to the *de minimis* time spent donning and doffing required gear and the more extensive time spent in walking and waiting. He reached this similar conclusion after examining the history and underlying tensions that were presented in the legislative history of the FLSA and the Portal-to-Portal Act, in the U.S. Supreme Court's precedents in the area, and in contractions between the regulations of the Labor Department and contradictory recommendations of the Labor Secretary.

<sup>59</sup> *Supra*, n. 3, at 520.

<sup>60</sup> *Id.* at 520.

<sup>61</sup> *Id.* at 520. 29 C.F.R. §790.6(a) states that: "That to the extent that activities engaged in by the employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of [§4] have no application."

<sup>62</sup> *Id.* at 520-521.

<sup>63</sup> *Id.* at 521.

<sup>64</sup> Even if IBP had entertained hopes that the decision in *Steiner* might be overruled, it became clear during oral arguments that that was not going to occur. Justice Stevens confirmed that belief in his opinion when he wrote "considerations of *stare decisis* are particularly forceful in the area of

statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades." *Id.* at 523.

<sup>65</sup> *Id.* at 523, citing *Steiner*, *supra*, note 19, at 253.

<sup>66</sup> *Id.* at 523, citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

<sup>67</sup> *Id.* at 523-524. .

<sup>68</sup> *Id.* at 524.

<sup>69</sup> *Id.* at 524.

<sup>70</sup> §790.7(c) states that the Portal-to-Portal Act does not affect the compensability of time spent traveling from the place of performance of one principle activity to that of another. §785.38 states that "where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work and must be counted as hours worked [under the FLSA.]"

<sup>71</sup> *Id.* at 524.

<sup>72</sup> Footnote 49 states that: "Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.' This *does not necessarily mean*, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers." (Emphasis added.)

<sup>73</sup> *Supra*, n. 3, at 525.

<sup>74</sup> The Supreme Court noted that since it had already addressed the issue of the compensability for the time spent walking between the location where the gear was donned and doffed in favor of the employees, it only needed to consider the compensability for the pre-donning waiting time. *Supra*, n. 3, at 527.

<sup>75</sup> *Id.* at 527.

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<sup>76</sup> *Id.* at 527.

<sup>77</sup> In this case, the waiting time was two steps removed from the productive activity on the assembly line and is therefore not “integral and indispensable” to a “principal activity.”

<sup>78</sup> *Id.* at 527.

## FIRST AMENDMENT RIGHTS OF FACULTY AND STUDENTS: A PERSPECTIVE

by

Gwen Seaquist\*  
Alka Bramhandkar\*\*

### INTRODUCTION

Assume a faculty member at a public college is reprimanded by her department chair for the following reasons: she is told that her explanations to her students are unclear. In a recent class she taught, she gave 13 incompletes. When students approach her about making up the incomplete, she does not explain how to successfully complete the course. The students complain to her chair and she is given a reprimand and eventually not re-hired.

The faculty member sues the college. She alleges infringement of her rights to free speech and academic freedom “in retaliation for her refusal to comply with a request that she communicate more clearly to her students what was required to complete the coursework in a class she taught in the fall of 2000.”<sup>1</sup>

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